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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 436

BIRDIE MAE DAVIS, ET AL.,
Petitioners,

vs.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF STATE OF MISSISSIPPI, AMICUS CURIAE

This brief of the State of Mississippi, amicus curiae, is presented for the State of Mississippi sponsored by its attorney general, the authorized law officer thereof.

THE INTEREST OF THE STATE OF MISSISSIPPI, AMICUS CURIAE

The State of Mississippi has a vital interest in the resolution of the questions presented herein. The welfare of its 149 public school districts—perhaps the survival of public school education in the State—depends on the answers which this Court gives to those questions. It is hardly conceivable that the outcome of any other case could have as much significance to the State of Mississippi and its citizens as the outcome of this case.

Illustrative of the importance of this case to the public school districts of Mississippi is its bearing on the ultimate outcome of the case involving the Clarksdale Municipal Separate School District, now before the Court of Appeals for the Fifth Circuit on Motion for Rehearing In Banc. Because the developments in that case are a fair example of developments in numerous other Mississippi school districts, and because they illuminate the problems dealt with herein, a brief resumé of them will be given.

Clarksdale is a town of approximately 22,000 inhabitants. It is bisected by the railroad tracks of the Illinois Central Railroad Company which run in an easterly and westerly direction from the northeastern to the southwestern corner of the town, dividing it into approximately equal northerly and southerly halves. Accentuating the division of the residential areas of the town made by those railroad tracks is the fact that throughout a good portion of the town the lands adjacent to both the northerly and southerly side of those railroad tracks are occupied by commercial and industrial establishments. Also adding to such division is the fact that those railroad tracks, located as they are in a town situated in the flat lands of the Yazoo-Mississippi Delta, are on an embankment. With

but the exception of where one street crosses over the tracks, one cannot cross those railroad tracks from one residential area to another except through an underpass. And throughout the length of those railroad tracks as they pass through Clarksdale—some three and a half miles—there are but four underpasses, with but one west of the Sunflower River and that one right next to the river.

The southerly half of the town is bisected almost equally by the railroad tracks of the Illinois Central Railroad Company which run in a southerly direction from Clarksdale to Jackson. Those tracks, which create a southwest quadrant and a southeast quadrant, are not elevated and one can cross over at grade level at almost every intersection.

The northerly half of the town is bisected by the Sunflower River, which creates a northwest quadrant and a northeast quadrant. The central business district of the town is in the northeast quadrant of the town. There are two bridges over the river in the northerly section of the town (just as there are two bridges over the river in the southerly half of the town) which enable those few elementary school pupils who live in the northeast quadrant of the town to pass over into the northwest quadrant of the town (which is entirely residential) without passing through the central business district.

The school district's facilities include:

1) Two senior high schools; one in the northwest quadrant of the town and the other in the southeast quadrant of the town. The one in the northwest quadrant of the town is located so as to conveniently serve those high school pupils who live north of the east-west railroad tracks. The one in the southeast quadrant is located so

as to conveniently serve those high school pupils who live south of the east-west railroad tracks.

2) Three junior high schools; one in each of the northwest, southwest and southeast quadrants of the town. Each is located so as to conveniently serve those junior high pupils who live in the quadrant in which it is located. The one in the northwest quadrant is most conveniently located for those few junior high pupils who live in the northeast quadrant of the town.

3) Seven elementary schools; three in the northwest quadrant of the town, and two in each of the southwest and southeast quadrant of the town. Each is located so as to conveniently serve those elementary pupils who live in the neighborhood wherein it is located. Few, if any, elementary pupils live more than half a mile from the elementary school in his neighborhood.

The school district does not provide transportation for its pupils. The laws of Mississippi provide no authority for it to do so.

Racially, Clarksdale is almost evenly divided between Negroes and whites, and, of course, as in all other towns and cities where there is a bi-racial population there is an uneven distribution of the races throughout the community. A majority of its whites live north of the east-west railroad tracks. Practically all of its Negroes live south of those tracks. But there are sizable areas where the races are mixed. The area served by the high school in the southeast quadrant of the town, and the areas served by the junior high schools in the southwest and southeast quadrants of the town, have a substantial amount of racial mixture in their population. In the neighborhood served by one of the elementary schools in the southwest quadrant of the town, about half of the area is composed of whites.

The neighborhood served by the other elementary school in the southeast quadrant of the town has a considerable number of whites among its predominantly Negro population.

When the school district was called upon to submit a desegregation plan (it was the first in the Northern District of Mississippi to be so called upon), it proceeded to do that which it understood *Brown* required it to do, i.e., to abolish its dual zone lines, and then to adopt a desegregation plan which calls for compact attendance areas or zones, with reasonable, rational and natural boundaries, and which includes the requirement that all pupils, without exception, attend the school in the zone wherein he or she lives, thereby basing its admission policy on residence and not on race.

The school district's desegregation was approved by order of the district court dated December 13, 1965.

An appeal was taken to the Court of Appeals for the Fifth Circuit. Hearing of the appeal was expedited so that it would be, and was, argued along with the *Jefferson* cases, in April of 1966. However, it was not decided along with the *Jefferson* cases; probably because they were "freedom-of-choice" cases.

No action was taken on the appeal for almost three years. It was not until March 6, 1969, that the court handed down its opinion wherein it remanded the case for a hearing to determine the effectiveness of the plan in today's factual setting.

When the case came on for rehearing before the district court, the court had before it the district's desegregation plan and a plan developed by the United States Office of Education, Department of Health, Education and Welfare, which the court had had prepared. After hearing the evidence with respect to them, the district court found the

HEW plan to "border almost on the indefensible" and "beyond the rule of reason." As to the district's plan, the court found it to be fundamentally sound, and could fault it for only one thing: It had not produced racially balanced schools.

> "The one defect . . . is that it hasn't produced an acceptable degree of integration. If it had, why, that would be an ideal plan."

In order to bring about the racial balance which it apparently felt it had to achieve, the district court, by its order of January 10, 1970, directed the consolidation of the district's two high schools into one high school and the consolidation of the district's three junior high schools (with the exception of one grade in one of them, which couldn't be accommodated on account of space) into one junior high school. However, because it could find no way to restructure the district's elementary schools without doing violence to recognized educational considerations and elementary common sense, it left the district's elementary schools as they were until it could have a report from a Special Master, which it then appointed to make a study and formulate recommendations for the operation of the district's elementary schools.

After the Special Master's report was in, another hearing was had. It resulted in the court's order of May 8, 1970, which adopted the Special Master's recommendation that no change be made in the operation of the district's elementary schools ("all students enrolled in grades 1-6 shall be assigned to elementary schools . . . nearest each student's residence, regardless of zone, present or previous racial enrollment of the school") but with an absolute right of majority to minority transfer.

Appeals were taken by both sides from the orders of January 10, 1970, and May 8, 1970, and were decided by the Court of Appeals for the Fifth Circuit on August 12, 1970 (Rebecca E. Henry, et al. v. The Clarksdale Municipal Separate School District, et al.), with one of the three judges dissenting. The district court's consolidation of the district's senior and junior high schools was confirmed, and the HEW plan was ordered into effect.

As a result of the Circuit Court's action, the district's schools which were built to serve the pupils in the neighborhoods in which they were located, have been completely restructured. Now all high school pupils south of the east-west tracks have to attend the high school north of those tracks. All junior high school pupils north of the east-west tracks have to attend a junior high school south of those tracks. All first and second grade pupils north of the east-west tracks, and some third grade students north of those tracks, have to attend an elementary school south of those tracks. Some third, fourth, fifth and sixth grade students south of the east-west tracks have to attend elementary schools north of those tracks.

All of the foregoing was required for one purpose: to bring about racial balance in schools which would otherwise remain racially unbalanced because of residential patterns in the neighborhoods wherein they were located.

The developments in the Clarksdale Municipal Separate School District are typical of developments in the other school districts of Mississippi. Hence the interest of the State of Mississippi in the outcome of this case.

ARGUMENT

In *Brown I* and *Brown II* (347 U.S. 483, 98 L. Ed. 873; 349 U.S. 294, 99 L. Ed. 1083), this Court called for the cessation of the practice of segregating children solely on the

basis of their race, and the establishment of systems whereby the admissions of children to public schools would be determined on a nonracial basis. In spelling out how those objectives should be accomplished, it authorized *the revision of school districts and attendance areas, within the limits set by normal geographic school districting, into compact units, to bring about a system not based on color distinctions.* In addition, the Congress and the President of the United States, through the enactment of the *Civil Rights Act of 1964*, placed their approval on the holding of the Court of Appeals for the Seventh Circuit in *Bell* v. *School City of Gary, Ind.*, 324 F. 2d 209 (certiorari denied 377 U.S. 924, 12 L. Ed. 2d 216), wherein the fact of de facto segregation which fortuitously resulted from housing patterns was held not to invalidate a school system developed on the neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races. Consequently, a desegregation plan which provides for the creation of attendance areas or zones fairly arrived at, bounded by natural, nonracial monuments which define, in truth and in fact, true neighborhoods, and directs that all children living in such an attendance area or zone, without exception, should attend the appropriate school in his or her attendance area or zone, is in accord with both *Brown* and the *Civil Rights Act of 1964*, even though some of the attendance areas or zones are populated, as a result of housing patterns in the community, with people of one race.

Yet despite the fact that when this Court spoke in *Brown* of attendance areas, it said that such areas should be "*compact units*" constructed "*within the limits set by normal geographic school districting,*" and when it spoke in *Brown* of the type of school system which should be created, it said that such system should be "*a system not*

based on color distinctions," and when it spoke in *Brown* of admission policies which should be achieved, it said that admissions of children to public schools should be on "*a non-racial basis,*" and despite the fact that the thrust of *Bell*—"which was that if school districts were drawn *without regard to race*, . . . those districts are valid *even if there is racial imbalance* caused by discriminatory practices in housing"—was written into the *Civil Rights Act of 1964*, and despite the provisions of *Sections 401, 407* and *410* of the *Civil Rights Act of 1964*, wherein school districts were authorized to assign students according to their residences and courts were prohibited from shifting students in order to achieve racial balance, petitioners contend (and some courts, such as the Court of Appeals for the Fifth Circuit, agree with them) that a desegregation plan such as has been described in the preceding paragraph is constitutionally defective and must be rejected for no other reason than to create a "racial balance" in schools and that zone lines, to be valid, have to be gerrymandered in order to alleviate racial imbalance resulting from housing patterns.

We submit:

1. That de facto segregation which occurs fortuitously because of housing patterns does not render an otherwise acceptable desegregation plan unconstitutional:

2. That the courts, in view of the provisions of the *Civil Rights Act of 1964*, do not have authority to issue orders seeking to achieve a racial balance in neighborhood schools;

3. That the Fourteenth Amendment to the Constitution of the United States does not require a school district to gerrymander its attendance area or zone lines so as to include pupils of a certain race within an attendance area or zone, who would not be included therein if its attend-

ance area or zone lines were drawn in a reasonable, rational and nonracial fashion; and

4. That the courts do not have the authority to require the employment of school personnel on a racial basis.

Brown (A) Requires the Cessation of Segregating Children in Public Schools Solely on the Basis of Race; (B) Directs, As the Means of Achieving the Desegregation of the Schools of a District, the Creation of Compact Attendance Areas; (C) Orders the Achievement of a System of Determining Admissions to the Public Schools on a Nonracial Basis; and (D) Commands the Creation of a System Not Based on Color Distinctions.

The four cases which are grouped under the name of *Brown* v. *Board of Education*, 347 U.S. 483, 98 L. Ed. 873, all presented challenges to legally imposed systems of segregation which either permitted or required separate schools for Negro and white children. The question posed by them, according to the court, was,

> "Does segregation of children in public schools *solely on the basis of race*, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" (Emphasis added.)

To its own question, the court gave this succinct answer:

> "We believe that it does."

The Court then went on to say:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, *by reason of the segregation complained of*, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." (Emphasis added.)

The paragraph quoted does contain the sentence: "Separate educational facilities are inherently unequal." But surely that sentence must be read in the context of what had theretofore been said in the opinion, as well as that which was thereafter said therein, and particularly in the light of the legal question before the court. If so read, any fair minded person would have to conclude that the separate educational facilities referred to were those to which the students are assigned *solely on the basis of their race.*

A fair reading of *Brown* will show that it held simply that:

> " 'To separate (Negro children) from others of similar age and qualifications *solely because of their race* generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.' " (Emphasis added.)

Thereafter, in spelling out the manner in which its original decision had to be implemented (349 U.S. 294, 99 L. Ed. 1083) the court authorized to lower federal courts to consider—

> ". . . problems related to administration, arising from the physical condition of the school plant, the school transportation system, *revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis.*" (Emphasis added.)

The sort of attendance areas which this court had in mind was indicated in one of the questions propounded for reargument, as attendance areas resulting from

> "normal geographic school districting."

And those words have been almost unanimously construed by the courts as authorization for attendance areas

or zones honestly and conscientiously constructed without regard for race, and as requiring the disapproval of attendance areas gerrymandered for racial purposes.

Petitioners should have no quarrel with the holdings of those cases. For in the brief filed by the NAACP in *Brown II*, it was stated on page 12:

> "The extent of the boundary alterations required, in the reformulation of school attendance areas on a nonracial basis, will vary. This is illustrated by the recent experience in the District of Columbia in recasting attendance boundaries on a wholly geographical basis. *In the neighborhoods where there is little or no mixture of the races, and where school facilities have been fully utilized,* it was found that the *elimination of the racial factor did not work any material change in the territory served by each school.*" (Emphasis supplied.)

In *Brown II*, this Court directed school boards "to achieve a system of determining admission to the public schools on a nonracial basis."

That the systems to be created pursuant to its directions should be free of racial considerations was made clear by this Court in one of the questions propounded for reargument when it described the sort of system it desired as—

> "a system not based on color distinctions."

Thus the mandate of *Brown* clearly is—

a) To cease the practice of segregating children solely *on the basis of race*;

b) To revise school districts and attendance areas "into *compact units*";

c) "To achieve a system of determining admissions to the public schools *on a nonracial basis*"; and

d) To create *"a system not based on color distinctions."*

The Subsequent Decisions of This Court, Rightly Interpreted, Are Not Contrary to What Was Said in Brown.

Since *Brown*, this court has handed down several decisions which are sometimes said to contradict what was clearly set forth in *Brown*. But we submit that those decisions, rightly interpreted, in no way militate against what was said in *Brown*.

For instance, in deciding *Alexander* v. *Holmes County Board of Education*, ... U.S. ....., 24 L. Ed. 2d 19, this Court said, in the first paragraph of its order:

> "The Court of Appeals' order of August 28, 1969, is vacated, and the cases are remanded to that court to issue its decree and order, effective immediately, declaring that each of the school districts here involved may no longer operate a dual school system *based on race or color*, and directing that they begin immediately to operate as unitary school systems within which *no person is to be effectively excluded from any school because of race or color*." (Emphasis added.)

The statements in the order that school districts may no longer operate a dual system *based on race or color*, and that *no person is to be effectively excluded from any school because of race or color*, are essentially the same as the *Brown* directives "to achieve a system of determining admissions to the public schools *on a nonracial basis*" and to create "*a system not based on color distinctions.*"

Cases such as *Green* v. *County School Board of New Kent County, Va.*, 391 U.S. 430, 20 L. Ed. 2d 716; *Raney* v. *Board of Education*, 391 U.S. 443, 20 L. Ed. 2d 727; and *Monroe* v. *Board of Commissioners*, 391 U.S. 450, 20 L. Ed. 2d 733, did not deal with factual situations such as were before the court in *Brown*, nor with the validity of desegregation plans formulated pursuant to the directives of

Brown. They were "freedom-of-choice" cases wherein the question presented was whether, and on what conditions, a defendant district would be permitted to operate its schools by a method designed to avoid the zoning requirements of *Brown*. Such question is, of course, vastly different from the question of whether a district organized and operating under an attendance area plan in accordance with the requirements of *Brown* can ignore the race of its pupils in creating its attendance areas or zones, or has to take the race of its pupils into account when creating its attendance areas or zones.

In *Green*, according to this court—

> "The question for decision (was) whether, under all the circumstances here, respondent School Board's adoption of a 'freedom-of-choice' plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board's responsibility 'to achieve a system of determining admissions to the public schools on a nonracial basis. . . .'"

That the answer to that question has no application to cases involving the effect of de facto segregation which occurs fortuitously because of housing patterns on an otherwise acceptable desegregation plan, is amply shown by this paragraph from the court's opinion:

> "There is no residential segregation in the county; persons of both races reside throughout. The school system has only two schools, the New Kent school on the east side of the county and the George W. Watkins school on the west side. . . . The School Board operates one white combined elementary and high school (New Kent) and one Negro combined elementary and high school (George W. Watkins). There are no attendance zones. Each school serves the entire county."

The first paragraph in *Raney* v. *Board of Education*, 391 U.S. 443, 20 L. Ed. 2d 727, shows that it is subject to the same comments as were applied to *Green*:

> "This case presents the question of the adequacy of a 'freedom-of-choice' plan as compliance with Brown v. Board of Education, 349 U.S. 294, 99 L. Ed. 1083, 75 S. Ct. 753 (Brown II), a question also considered today in Green v. County School Board of New Kent County, 391 U.S. 430, 20 L. Ed. 2d 716, 88 S. Ct. 1689. *The factual setting is very similar to that in Green.*" (Emphasis added.)

In *Monroe* v. *Board of Commissioners*, 391 U.S. 450, 20 L. Ed. 2d 733, the question, according to the court, was similar to the question decided in *Green* and *Raney* in that the "free transfer" provision in the plan then before the court, which operated as a device to allow resegregation of the races to the extent desegregation would be achieved by geographically drawn zones, converted the plan into what was essentially a "freedom-of-choice" plan, subject to the same tests as were applied in *Green* and *Raney*.

In addition to the fact that *Green* dealt with a factual situation entirely dissimilar to those under consideration in *Brown*, it can be pointed out that it did not call for integration as such; with painstaking care, its aim was repeatedly stated in terms of "desegregation." The opinion could not have been more clear. The obligation on school boards, it said, is to produce effective plans "achieving desegregation." They must make progress "toward disestablishing state-imposed segregation." They must "dismantle the state-imposed dual system." Lower courts should make certain that "state-imposed segregation has been completely removed."

In brief, according to *Green*, the responsibility of school boards is "to effectuate conversion of a state-im-

posed dual system to a unitary, nonracial system." And this conversion means "a system without a 'white' school and a 'Negro' school, but just schools."

Yet *Green* is being misused by some courts as the basis for orders striking down legitimate desegregation plans, based on residential zoning, on the ground that it (*Green*) proscribes neighborhood schools that do not result in racially balanced student bodies. *Green* was so misused in the rejection of the Clarksdale plan.

De Facto Segregation—Which Occurs Fortuitously Because of Housing Patterns— Does Not Make an Otherwise Acceptable Desegregation Plan Unconstitutional.

The paramount question before the court is whether a desegregation plan constructed on a nonracial basis is constitutional, regardless of the fact that all-black and all-white schools result therefrom because of the residential patterns in the community, or whether a desegregation plan must result in racially balanced schools, even though to achieve that result wholesale assignments by race must be made, is essentially the same as the question of whether de facto segregation—which occurs fortuitously because of housing patterns—makes an otherwise acceptable desegregation plan unconstitutional.

As we have pointed out, the directives for the construction of attendance areas or zones, as set forth in *Brown*, are—

> First, the attendance areas or zones must be "compact units," and
>
> Second, the system thus created must be "a system not based on color distinctions."

Brown necessarily was to the effect that de facto segregation—that which occurs fortuitously because of housing

patterns—does not make an otherwise acceptable desegregation plan unconstitutional. For if an area around a school is inhabited solely by whites or blacks, the creation of the "compact units" required by *Brown* will necessarily result in racially imbalanced attendance areas or zones. Only by the drawing of zone lines without regard to color can "a system not based on color considerations" be devised. For only if attendance areas or zones are set up as they should be: through the drawing of reasonable, rational and nonracial lines, without regard to the race of the pupils enclosed thereby, will admissions to the school of that zone be determined on a nonracial basis, i.e., the residence of the pupils. But if the boundaries of the attendance areas or zones must be gerrymandered so as to include certain pupils within the zone who would not be included therein if those boundary lines were drawn in a reasonable, rational and nonracial fashion, then the admission into the school of the zone of those pupils artificially brought into the zone will be based on racial considerations, in defiance of the command of *Brown*.

From the very beginning—in fact, in *Brown* after remand to the trial court—it has been held that if attendance areas or zones are fairly arrived at, and all children living in each attendance area or zone are required to attend the school in that area or zone, no violation of the Fourteenth Amendment results even though the concentration of children of one race in particular areas or zones results in racial imbalance in the schools. *Brown* v. *Board of Education of Topeka*, 139 F. Supp. 468. To quote from the trial court's opinion:

> "If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live."

At least four Courts of Appeals have reached the same conclusion. The Seventh, in *Bell* v. *School City of Gary, Ind.*, 324 F. 2d 209 (certiorari denied 377 U.S. 924, 12 L. Ed. 2d 216), which first appeared in 213 F. Supp., at page 819, was presented the question whether the schools of Gary, with some having all-white and some all-colored student bodies, met the requirements of *Brown*. After pointing out that the composition of those student bodies was the result of the concentration of the city's Negroes in certain sections, the court added:

> "We approve . . . the statement in the District Court's opinion, 'Nevertheless, I have seen nothing in the many cases dealing with the segregation problem which leads me to believe that the law requires that a school system developed on the neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races, must be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the district is populated almost entirely by Negroes or whites. . . .'"

The Tenth Circuit Court of Appeals reached the same conclusion in *Downs* v. *Board of Education of Kansas City*, 336 F. 2d 988 (certiorari denied 380 U.S. 914, 13 L. Ed. 2d 800), which involved a broad attack on the administration of the Kansas City, Kansas, school system, and particularly on the action of the school board in defining school boundary lines and requiring students to attend the school in the district in which they lived, with the result that some of the schools were all-white and some all-Negro. But, said the court:

> "The neighborhood school system and other school systems, by which admission to the school is determined upon the basis of similar criteria such as residence and aptitude, are in use in many parts of the country. . . . In the second Brown case, supra,

the Supreme Court appears to have recognized that school admissions may be based upon such factors as residence. It said that in determining 'good faith compliance at the earliest practicable date,' the lower courts might take into account problems arising from the '* * * revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis * * *'.

. . .

"We conclude that the decisions in Brown and the many cases following it do not require a school board to destroy or abandon a school system developed on the neighborhood school plan, even though it results in a racial imbalance in the schools, where, as here, that school system has been honestly and conscientiously constructed with no intention or purpose to maintain or perpetuate segregation."

The Fourth Circuit Court of Appeals reached the same conclusions in *Gilliam* v. *School Board of the City of Hopewell, Va.*, 345 F. 2d 325, which involved a neighborhood school plan which inevitably resulted in some all-Negro schools because of "the fact that the surrounding residential areas are inhabited entirely by Negroes." In rejecting the objections thereto, the court said:

"The plaintiffs object that the result of the geographic zoning is a large measure of de facto segregation. It is true that it is, but this is because of the residential segregation that exists.

. . .

"The Constitution does not require the abandonment of neighborhood schools and the transportation of pupils from one area to another solely for the purpose of mixing the races in the schools."

Deal v. *Cincinnati Board of Education*, 369 F. 2d 55, decided by the Sixth Circuit Court of Appeals on Decem-

ber 6, 1966, is also to the same effect. In it, the appellants posed the question—

> "Whether the neighborhood system of pupil placement, fairly administered without racial bias, comports with the requirements of equal opportunity if it nevertheless results in the creation of schools with predominantly or even exclusively Negro pupils."

In responding, the court said:

> "The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children, in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral, easily determined standards, and better home-school communication. The Supreme Court in *Brown* recognized geographic districting as the normal method of pupil placement and did not foresee changing it as the result of relief to be granted in that case.
>
> . . .
>
> "Because of factors in the private housing market, disparities in job opportunities, and other outside influences (as well as positive free choice by some Negroes), the imposition of the neighborhood concept on existing residential patterns in Cincinnati creates some schools which are predominantly or wholly of one race or another. Appellants insist that this situation, which they concede is not the case in every school in Cincinnati, presents the same separation and hence the same constitutional violation condemned in *Brown*. We do not accept this contention. *The element of inequality in Brown was the unnecessary restriction on freedom of choice for the individual, based on the fortuitous, uncontrollable, arbitrary fac-*

tor of his race. The evil inherent in such a classification is that it fails to recognize the high value which our society places on individual worth and personal achievement. Instead, a racial characterization treats men in the mass and is unrelated to legitimate governmental considerations. It fails to recognize each man as a unique member of society.

"In the present case, the only limit on individual choice in education imposed by state action is the use of the neighborhood school plan. Can it be said that this limitation shares the arbitrary, invidious characteristics of a racially restrictive system? We think not. In this situation, while a particular child may be attending a school composed exclusively of Negro pupils, he and his parents know that he has the choice of attending a mixed school if they so desire, and they can move into the neighborhood district of such a school. This situation is far removed from *Brown*, where the Negro was condemned to separation, no matter what he as an individual might be or do. Here, if there are obstacles or restictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school, prejudice. We read *Brown* as prohibiting only enforced segregation." (Emphasis supplied).

The Sixth Circuit Court of Appeals, on February 10th, 1969, reaffirmed its holding in *Deal.* In *Goss* v. *Board of Education, City of Knoxville, Tennessee,* 406 F. 2d 1183, it had this to say of a plan which required each student to be assigned to the school in the district in which he or she resides:

"Preliminarily answering question I, it will be sufficient to say that the fact that there are in Knoxville some schools which are attended exclusively or predominantly by Negroes does not by itself establish that the defendant Board of Education is violating the constitutional rights of the school children of

Knoxville. Deal v. Cincinnati Bd. of Education, 369 F. 2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847, 88 S. Ct. 39, 19 L. Ed. 2d 114 (1967); Mapp v. Bd. of Education, 373 F. 2d 75, 78 (6th Cir. 1967). Neither does the fact that the faculties of some of the schools are exclusively Negro prove, by itself, violation of *Brown*."

Deal has been recently again before the Sixth Circuit Court of Appeals, with the same result. In an opinion handed down March 23, 1970, which can be found in 419 F. 2d at 1387 et seq., it said:

> "It is the contention of appellants that the Board owed them a duty to bus white and Negro children away from the districts of their residences in order that the racial complexion would be balanced in each of the many public schools in Cincinnati. It is submitted that the Constitution imposes no such duty."

And in its opinion the court agreed with our answer to the argument that the rule enunciated in *Bell* and followed in *Downs, Gilliam, Deal, Goss* and others, was changed by what the Supreme Court said in *Green, Raney* and *Monroe*. After stating that:

> "In the first appeal which involved a claim of alleged de facto rather than de jure segregation, we affirmed the judgment of the District Court on the issue of racial imbalance, holding that the Board of Education was not required by the Constitution to bus Negro or white children out of their neighborhoods, or to transfer classes, for the sole purpose of alleviating racial imbalance which was not caused by any act of discrimination on the part of the Board but resulted from the racial concentrations in the neighborhoods in which the schools were located,"

the court went on to say:

> "Appellants petitioned the Supreme Court for certiorari in the first appeal and it was denied. Cer-

tiorari was also denied in *Downs* and *Bell*, supra. The denial of certiorari in the present case ought to constitute our opinion in the first appeal as the law of the case, but appellants contend that the law has been changed by the recent decisions of the Supreme Court in Green v. County School Bd. of New Kent County, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968); Raney v. Bd. of Educ. of Gould School District, 391 U.S. 443, 88 S. Ct. 1967, 20 L. Ed. 2d 727 (1968); Monroe v. Bd. of Comm'rs of City of Jackson, 391 U.S. 450, 88 S. Ct. 1700, 20 L. Ed. 2d 733 (1968)."

But, said the court:

"In our opinion, these three decisions did not change any law applicable to our case and appellants' reliance on them is misplaced. The gist of the holdings in these cases was that in desegregating a dual school system, a plan utilizing 'freedom of choice' or a variant 'free transfer' is not an end in itself and would be discarded where it did not bring about the desired result."

And there are numerous district court cases which hold that de facto segregation, which occurs fortuitously because of housing patterns, does not make an otherwise acceptable desegregation plan unconstitutional—even some from district courts in the Fifth Circuit.[1] There are even cases from the Court of Appeals for the Fifth Circuit to that effect.[2] But, seemingly without exception, the Court of Appeals for the Fifth Circuit rules to the contrary when dealing with a plan originating with a Mississippi school district.

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1. *Griggs* v. *Cook*, 272 F. Supp. 163; *Moses* v. *Washington Parish School Board*, 276 F. Supp. 834; *Augustus* v. *School Board of Escambia County, Florida*, 299 F. Supp. 1069; *Mannings* v. *Board of Public Instruction of Hillsborough County, Fla.*, 306 F. Supp. 106.

2. *Ellis, et al.* v. *The Board of Public Instruction of Orange County, Fla.*, 423 F. 2d 203; *Carr* v. *Montgomery County Board of Education*, not yet reported; *Bivens, et al.* v. *Bibb County Board of Education* and *Thomie, et al.* v. *Houston County Board of Education*, not yet reported.

There is, of course, some de facto segregation in Mississippi; although probably less than in any other state of the Union. Where it is found, it is the result of the housing patterns in the community. But those housing patterns did not result from any state law or local ordinance. Mississippi has never had a law requiring residential segregation. Nor has any municipality of the state had such an ordinance.

Our former laws requiring the segregation of pupils by race in our public schools (which were perfectly constitutional before 1954) did not create or result in all-Negro or all-white neighborhoods. They had, in fact, no preceptible effect on housing patterns as they developed in Mississippi. Everyone familiar with Mississippi during the ante-*Brown* days knows full well that Negroes and whites then lived indiscriminately throughout the towns of the State. Whites frequently chose to live not too far from Negro schools. Negroes often lived within the shadows of a white school. Neither laws nor customs dictated otherwise. Those are facts so well known that a court can take judicial knowledge of them.

It was sometime during the 50's that Negroes who lived in predominantly white neighborhoods began to move —in some of our towns—into all-Negro neighborhoods. The movement seemed to have developed in and of itself, with no urgings or promptings by anyone. Every perceptive person realized that the Negroes were simply expressing their wish to live among their own kind. In any event, where there are all-white or all-Negro neighborhoods in Mississippi, the same have resulted from the voluntary movement of the Negroes of the community from the white sections into the Negro sections of the towns. That is also a fact well known to everyone who has lived in this state during the past twenty years.

We live in a pluralistic society. Our communities are as diverse as the races and the ethnic groups which populate them. All-white communities abound in sections outside the South. A few all-Negro communities can be found in the South. Towns made up of French-speaking citizens exist in Louisiana. Scandinavian groups compose communities located in the Mid-West. Perhaps the same can be said about German and Italian groups. For this country has provided a refuge for those of every race and nationality, with no restrictions on where they should settle. And since like attracts like, our various racial and ethnic groups have inevitably moved into those communities which numbered among their inhabitants those of their own group and have shunned those communities which do not have those of their background. For instance, while Mississippi has, along with its many Anglo-Saxons, those of German and Italian stock, it has no Scandinavians or Poles. It has Chinese but not Japanese. Other illustrations could be given.

Where communities have sizable facial or ethnic groups, those groups tend to congregate in identifiable sections of their community. In parts of Boston, none but Irish can be found. The same can be said of New York, which also includes sections composed exclusively of Italians. In San Francisco, Chinese have their own part of the city. Those are but examples of a phenomena well known to those familiar with American communities.

Negroes have the same tendencies as the white groups. Where they form a sizable proportion of the population, whether it be in the South, North, East or West, they naturally, and of their own volition, create their own neighborhood. It can be safely said that there is not a community in this country where Negroes, if there are enough of them, do not congregate into a particular section

of their community. The instincts which motivate their white counterparts to do so, also impel Negroes to live together.

There is some de facto segregation in the larger communities of Mississippi, just as there is in every community of any size in this nation where there is a sizable proportion of Negro population. Given the housing patterns which prevail in towns and cities throughout the country, any other result would be inconceivable. But the de facto segregation found in Mississippi is fortuitous de facto segregation and not the result of any law or ordinance. It is, in every essential respect, the same type of de facto segregation as prevails in Gary, Indiana, which was before the court in *Bell;* as prevails in Kansas City, Kansas, which was before the court in *Downs;* as prevails in Hopewell, Virginia, which was before the court in *Gilliam;* as prevails in Cincinnati, Ohio, which was before the court in *Deal;* as prevails in Knoxville, Tennessee, which was before the court in *Goss* v. *Board of Education, City of Knoxville, Tennessee,* 406 F. 2d 1183; as prevails in Atlanta, Georgia, which was before the court in *Griggs* v. *Cook,* 272 F. Supp. 163, 384 F. 2d 705; as prevails in Washington Parish, Louisiana, which was before the court in *Moses* v. *Washington Parish School Board,* 276 F. Supp. 834; as prevails in Orange County, Florida; Bibb County, Georgia; Houston County, Georgia; Atlanta, Georgia; Escambia County, Florida; St. Tammany Parish, Louisiana; which were before the courts in the cases above referred to, and as prevails in numerous other communities whose plans have been validated by the courts even though they encompassed areas where de facto segregation prevailed.

Where such de facto segregation exists, and a district's zones are set up as they should be: through the drawing of reasonable, rational and nonracial lines, with-

out regard to the race of the pupils enclosed thereby, there will be, of necessity, some all-black and some all-white schools. There is no escape from such an inevitable result, except the racist solution that children should be arbitrarily assigned to schools by race in order to create a racially balanced school. But we submit that neither race, nor religion, should be acknowledged as constituting in any way a valid condition or measure, in this nation, of a person's access to public facilities, positions or activities of any sort. Those who would make it such ought to be rejected with finality because, in racial matters, enduring progress and justice will come about only under rules of law which unswervingly treat all men as equal before the law, regardless of race, color or national origin, and which do not take into account their race, color or national origin.

The Civil Rights Act of 1964 Validates Bona Fide Neighborhood School Lines and Prohibits Court Orders Intended to Alleviate Racial Imbalance in Neighborhood Schools

As we have pointed out, *Bell* v. *School City of Gary* holds that de facto segregation which occurs fortuitously because of housing patterns is not unconstitutional. Now we point out that the gist of that holding was incorporated into the *Civil Rights Act of 1964*. This is clear from the language of Senator Humphrey, floor manager of the bill, as quoted in *Jefferson I* (372 F. 2d 836):

"Senator Humphrey explained:

" 'Judge Beamer's opinion in the *Gary* case is significant in this connection. In discussing this case, as we did many times, *it was decided to write the thrust of the court's opinion into the proposed* substitute.' (Emphasis added.)

. . .

"'*The bill does not attempt to integrate the schools,* but it does attempt to eliminate segregation in the schools. The natural factors, such as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, *if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional.* That is why we have attempted to clarify it with the language of Section 4.' (Emphasis added)."

The pertinent provisions of the *Civil Rights Act of 1964* are, of course, *Sections 401, 407* and *410* which read as follows:

"Sec. 401. As used in this title—

"(b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegration' shall not mean the assignment of students to public schools in order to overcome racial imbalance.

. . .

"Sec. 407. . . .

". . . nothing herein shall empower any official or court of the United States to issue any orders seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance.

. .

"Sec. 410.

"Nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin."

Although the Court of Appeals for the Fifth Circuit, by its later actions in cases such as the Clarksdale case which has been referred to, repudiated, in effect, its earlier holding, that court, in *Jefferson I*, recognized that the foregoing provisions of the *Civil Rights Act of 1964* validated bona fide neighborhood schools, even though accompanied by racial imbalance resulting from housing patterns. After defining the latter part of *Section 401*—

> "but desegregation shall not mean the assignment of students to public schools in order to overcome racial imbalance,"

that court, in *Jefferson I*, said:

> "The negative portion starting with 'but', excludes assignment to overcome racial imbalance, that is acts to overcome de facto segregation."

In support of its conclusion that the prohibition in *Section 407* against assignment of students to overcome racial imbalance was related solely to racial imbalance resulting from de facto segregation, that Court, in *Jefferson I*, went on to say this about the undefined term "racial imbalance":

> "It is clear however from the hearings and debates that Congress equated the term, as to commentators, with 'de facto segregation' that is, nonracially motivated segregation in a school system based on a single neighborhood school for all children in a definable area."

In recognition of the fact that "classification and assignment for reasons other than race, color, religion, or national origin," as used in *Section 410*, includes classification and assignment on the basis of residence, that Court, in *Jefferson I*, said:

> "The thrust of the *Gary* case (Bell) was that if school districts were drawn without regard to race,

> but rather on the basis of such factors as density of population, travel distances, safety of the children, costs of operating the school system, and convenience to parents and children, those districts are valid even if there is a racial imbalance caused by discriminatory practices in housing."

In *Deal* v. *Cincinnati Board of Education* (419 F. 2d 1387), the Court of Appeals for the Sixth Circuit said the same thing, when, in answering the contention of appellants—

> "that the Board owed them a duty to bus white and Negro children away from the districts of their residences in order that the racial complexion would be balanced in each of the many public schools in Cincinnati,"

it said:

> "It is submitted that the Constitution imposes no such duty."

And then went on to say:

> "In the Civil Rights Statute, Congress has expressed itself rather clearly on this subject in 42 U.S.C. §§ 2000 c, 2000 c-6 and 2000 c-9."

It follows from the express words of the *Civil Rights Act of 1964* that attendance areas or zones are valid even if there is a racial imbalance therein, and that courts are without authority to issue any order designed to achieve a racial balance in schools.

The Fourteenth Amendment Is Prohibitory Only, and What It Prohibits Is Racial Classifications by Law

The questions before the court must turn upon the proper construction of that provision of the Fourteenth Amendment which reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is fundamental that for there to be a violation of the Fourteenth Amendment in the respect here under consideration, there must appear a denial by a state of equal protection of its laws. There can be no doubt as to what the Congress intended by the use of the word "State" in the Fourteenth Amendment. The word "State" or "States" had been used seventy times in the original Constitution. Furthermore, there can be no doubt as to what the Congress meant by the word "laws." The word "law" or "laws" as meaning statute or statutes enacted by a legislative body, state or federal, had been used twenty-five times in the Constitution.

At the October, 1875, Term of this Court, just seven years after the adoption of the Fourteenth Amendment, when it first became necessary for the courts to construe or apply it, the Supreme Court spoke certainly and clearly:

> The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. The duty was originally assumed by the States; and it still remains there. *The only obligation resting upon the United States is to see that the States do not deny the right.*

> *This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.*[3]

In 1896, this court, in the landmark case of *Plessy* v. *Ferguson*, 163 U.S. 537, 41 L. Ed. 256, decided that a Louisiana statute requiring the segregation of the races on public carriers did not violate the Fourteenth Amendment. Mr. Justice Harlan voiced a strong dissent. He urged that the Constitution must be color-blind.

> "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved.
>
> "These notable additions to the fundamental law (the 13th, 14th and 15th Amendments to the Constitution of the U. S.) were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems.
>
> . . .
>
> "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."

When the transfer provisions incorporated into the desegregation plans of the public school systems of Knoxville, Tennessee, which were based solely on racial factors, came on for review in *Goss* v. *Board of Education*, 373 U.S. 683,

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3. *United States* v. *Cruikshank*, 92 U.S. 542, 554-55. (Emphasis added.)

10 L. Ed. 2d 632, this Court, in invalidating them, borrowed from the language in one of its prior decisions to say—

> "Racial classifications are 'obviously irrelevant and invidious.' "

And then went on to capsulize a history of those of its decisions which demonstrated its animosity toward racial classifications:

> ". . . The cases of this Court reflect a variety of instances in which racial classifications have been held to be invalid, e.g., public parks and playgrounds, Watson v. Memphis, 373 U.S. 526, 10 L. Ed. 2d 529, 83 S. Ct. 1314 (1963); trespass convictions, where local segregation ordinances pre-empt private choice, Peterson v. Greenville, 373 U.S. 244, 10 L. Ed. 2d 323, 83 S. Ct. 1119 (1963); seating in courtrooms, Johnson v. Virginia, 373 U.S. 61, 10 L. Ed. 2d 195, 83 S. Ct. 1053 (1963); restaurants in public buildings, Burton v. Wilmington Parking Authority, 365 U.S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961); bus terminals, Boynton v. Virginia, 364 U.S. 454, 5 L. Ed. 2d 206, 81 S. Ct. 182 (1960); public schools, Brown v. Board of Education, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686, 38 A.L.R. 2d 1180, supra; railroad dining car facilities, Henderson v. United States, 339 U.S. 816, 94 L. Ed. 1302, 70 S. Ct. 843 (1950); state enforcement of restrictive covenants based on race, Shelley v. Kraemer, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, 3 A.L.R. 2d 441 (1948); labor unions acting as statutory representatives of a craft, Steele v. Louisville & N. R. Co., 323 U.S. 192, 89 L. Ed. 173, 65 S. Ct. 226, supra; voting, Smith v. Allwright, 321 U.S. 649, 88 L. Ed. 987, 64 S. Ct. 757, 151 A.L.R. 1110 (1944); and juries, Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1879)."

It followed with a gist of a decision by the Court of Appeals for the Fifth Circuit:

> ". . . *The recognition of race* as an absolute criterion for granting transfers which operate only in the

direction of schools in which the transferee's race is in the majority *is no less unconstitutional* than its use *for original admission* or subsequent assignment *to public schools.* See Boson v. Rippy, 285 F. 2d 43 (C.A. 5th Cir.)." (Emphasis added.)

In that case which this Court cited with approval, the Court of Appeals for the Fifth Circuit said:

". . . Negro children have no constitutional right to the attendance of white children with them in the public schools. Their constitutional right to 'the equal protection of the laws' is the right to stand equal before the laws of the State; that is, to be treated simply as individuals without regard to race or color. The dissenting view of the elder Mr. Justice Harlan in Plessy v. Ferguson, 1895, 163 U.S. 537, 559, 16 S. Ct. 1138, 1146, 41 L. Ed. 256, has been proved by history to express the true meaning of our Constitution:

"'. . . There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as quaranteed by the supreme law of the land are involved.'"

An Ohio federal court in 1964, in *Lynch* v. *Kenston School Dist. Bd. of Educ.*, 229 F. Supp. 740, related the principle of color-blindness to the problem of de facto segregation in education:

"In this cause of action the plaintiffs are requesting the Court to do what the Constitution forbids, that is, to recognize their color and to order them admitted to a school because of that color. Plaintiffs have a constitutional right not to be objects of racial discrimination, and they can vindicate that right in an action before this Court, but they do not have a constitutional right to attend or to refrain from attending a partic-

ular school on the basis of racial considerations when there has been no actual discrimination against them. The law is color-blind and, in cases such as this, that principle, which was designed to insure equal protection to all citizens, is both a shield and a sword. While protecting them in their right to be free from racial discrimination, it at the same time denies them the right to consideration on a racial basis when there has been no discrimination."

In *Holland* v. *Board of Public Education*, 258 F. 2d 730, the Fifth Circuit Court of Appeals described as a principle which it had announced in several of its decisions, "that the Fourteenth Amendment does not speak in positive terms to command integration, but negatively, to prohibit governmentally enforced segregation."

Evans v. *Buchanan*, 207 F. Supp. 821, from the District Court of Delaware, was an action by nine Negro children for an order transferring them from the all-Negro Dunleith School to the integrated Rose Hill Elementary School. In deciding the case, the court said:

"The court holds that the States do not have an affirmative, constitutional duty to provide an integrated education. The pertinent portion of the Fourteenth Amendment of the United States Constitution reads, 'nor (shall any State) deny any person within its jurisdiction the equal protection of the laws.' This clause does not contemplate compelling action; rather, it is a prohibition preventing the States from applying their laws unequally."

Bell, supra, was decided by the Seventh Circuit Court of Appeals, on the basis of what the three-judge court said in carrying out the directives of *Brown*:

"Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color."

In *Bradley* v. *School Board of City of Richmond, Va.*, 345 F. 2d 310 (April 7, 1965), the Fourth Circuit Court of Appeals said:

> "It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination."

In *Springfield School Committee* v. *Barksdale*, 348 F. 2d 261 (July 12, 1965), while the First Circuit Court of Appeals held that it was permissible for a school board to take action to eliminate racial imbalance in its schools, it said:

> "Certain statements in the opinion, notably that 'there must be no segregated schools,' suggest an absolute right in the plaintiffs to have what the court found to be 'tantamount to segregation' removed at all costs. *We can accept no such constitutional right.*"

There are literally dozens of other cases, from every section of the country, in which the same understanding of the Fourteenth Amendment is expressed. And, of course, there are some to the contrary.

Clearly, then, the ultimate legitimacy of racial balancing in the public schools will depend upon the choice that this Court makes between the mutually exclusive goals of color-blindness and color-consciousness. In arguing for what we consider to be the correct choice, it will not be sufficient to cite the rhetoric and holdings of courts, or the original intentions of the framers of the fourteenth amendment. Rather, it is essential to have recourse to the fundamental merits of the question.

We submit that the policy of racial balancing in pupil assignment to public schools is erroneous in theory and pernicious in effect. The policy of legal segregation, of "separate but equal" facilities for the races, was, whatever

its constitutionality, self-defeating and degrading for citizens of all races. A more difficult question, however, is that of replacing the "separate but equal" rationale with an enduring principle of even-handed fairness. Here, we ought to follow the suggestion of Mr. Justice Harlan, dissenting in *Plessy* v. *Ferguson*, that "our Constitution is color-blind, and neither knows nor tolerates classes among citizens." At this stage in our societal and constitutional development, we ought to realize that racial discrimination is morally evil. This is undeniably true at least where such discrimination is imposed by law. It is wrong, not because it does not work, but because it violates the equal dignity of all men before God and the law. What the racial balancers tell us, however, is that their brand of discrimination, of racial classification, is different, that it is good because they count themselves as benevolent and because they have in view an end, integration, which they regard as a useful and even compelling good. And they buttress their case by the ready testimony of social scientists and publicists who affirm, in learned terms, the dangers of racial separation and the benefits to all concerned which would arise from compulsive commingling.

It does not unfairly dramatize the point to observe that the racial theories which prevailed in Nazi Germany were not lacking pretentious support from social scientists, and were of course legitimized as a means to attain a desirable end. Moreover, tides and fads in the so-called social sciences do ebb and flow. If the newly-secured rights to racial justice under law are to endure, they must be immunized from any experimentation premised upon the supposition that American citizens can be legitimately divided and classified for any reason on racial grounds.

Nor is racial balancing essential for the improvement of public education. There is no necessary correlation between integration as such and the quality of education

received in a school. Indeed, a precipitate pursuit of integration as a goal in itself can inhibit the improvement of educational standards. Moreover, there is reason to believe that the shifting of pupils from one school to another, especially in disregard of the common-sense, racially neutral advantages of neighborhood schools, can lead to an increase in the rebellion and violence which we have come to regard as ordinary in some public school systems. When racial balancing involves, as it inevitably must, a compulsory movement of grade-school children away from the public school which otherwise would serve their normal neighborhood, it does so at the expense of a further weakening of that parental supervision which is an important ingredient in the conduct of a primary school. It represents, symbolically at least, a further aggrandizement of the state, which thereby asserts its primacy in the field of education, a primacy which, not incidentally, finds its expression in schools in which there can be no official recognition that in fact there is a divine standard of right and wrong higher than the state itself.

But the basic objection to racial balancing does not depend upon the distances involved. Rather, the vice is the classification by *race*.

Interestingly, the entire concept of racial balancing carries with it an inevitable implication that Negroes are inferior. This concept implies that the presence of white children automatically raises the quality of a school and that a preponderance of Negro pupils automatically lowers it. The Negro is the only minority group singled out for such treatment. Regardless of its beneficent purpose, the ruling carries the individious implication that Negroes necessarily tend to make a school inferior and, therefore, that in some undefined way Negroes are themselves inferior. It would seem that this is a denial of the Negro's equality under the law.

But, of course, the controlling factor in this Court's choice between the requirements of color-blindness and color-consciousness must be this Court's interpretation of the meaning of the Fourteenth Amendment as applied to this question: Does the Fourteenth Amendment require a "racial balance" in each of the public schools of the nation, which in turn requires the establishment of school systems based on color distinctions and the assignment of pupils to schools on the basis of their race? We submit that an affirmative answer would not be the true interpretation of our Constitution. It would involve, in fact, a repudiation of the basic premise that the Constitution of the United States does not permit public authorities to know, or to take into account, the race of citizens when their civil rights are involved, and it would actually validate the premise on which the "separate-but-equal" doctrine was bottomed. It would simply be a fallacious interpretation of the true meaning of our Constitution.

What we have just said should not be equated with a segregationist's argument. All we are saying is that integration *per se* should not be the *sine qua non* of a desegregation plan. It is not a contention that a school board is not required to compel compulsory association of the races if such be necessary for the purpose of desegregating its schools. For instance, we agree that where there are racially mixed neighborhoods which include pupils of both races who, within the limits of normal geographical limits, would naturally be assigned to the same school, the school board must require all in that neighborhood, both white and black, to attend the same school. *That is exactly what the Clarksdale plan does. Every pupil, both white and black, in every mixed neighborhood of the district is required by the Clarksdale plan to attend the same school.*

School Desegregation Requirements Should Be Uniform Throughout the Nation

It is a well known fact that plans such as the Clarksdale desegregation plan—which provides for the creation of attendance areas or zones fairly arrived at, bounded by natural, nonracial monuments which define, in truth and in fact, true neighborhoods, and directs that all children living in such an attendance area or zone, without exception, should attend the appropriate school in his or her attendance area or zone—are in force and effect throughout the United States and have either the express or tacit approval of the federal courts, even though, as a result of the housing patterns in those communities, the plan inevitably produces some all-white and some all-black schools. In other words, it is a notorious fact that requirements for school desegregation are not uniformly applied throughout the nation. In the Fifth Circuit, they are not uniformly applied throughout the circuit.

We submit that there should be no such thing as a federal system of regional laws. We submit that no state should be judicially declared to be a "bad" state or a "good" state. Or are states which today are lawfully carrying on their affairs to be punished tomorrow if this Court declares a new concept of Constitutional law, thereby invalidating such state action? We think Mr. Justice Thurgood Marshall expressed the proposition about as well as it can be expressed when, in argument to this Court while serving as counsel for the plaintiffs in the original *Brown* case, he stated:

> "The next point I want to make on the general side is what I made before, and that is the need for uniform application of our Constitution and all of its provisions throughout the Country so that freedom of the press won't mean one thing in one State and

> another thing in another state, so that all of these rights in the Constitution—It has never been said on any other right that I know of that special exceptions should be made as to one state or the other."

We concur with Mr. Justice Marshall on that point.

The theory that the "South" must pay its price for having, pursuant to what was then recognized without question as the law of the land, segregated the races in its schools was expressly rejected by the Sixth Circuit in *Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee,* in this language:

> "However ugly and evil the biracial school systems appear in contemporary thinking, they were, as Jefferson, supra, concedes, de jure and were once found lawful in Plessy v. Ferguson, 163 U.S. 537 (1896), and such was the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by Brown would be in the nature of imposing a judicial Bill of Attainder. Such proscriptions are forbidden to the legislatures of the states and the nation —U. S. Const. Art. I, Section 9, Clause 3 and Section 10, Clause 1. Neither, in our view, would such decrees comport with our current views of equal treatment before the law."

Dr. James Bryant Conant in *Slums and Suburbs* has a most fair-minded approach to the question when he says:

> "As I read the history of the United States, this Republic was born with a congenital defect—Negro slavery."

According to Dr. Conant this defect was allowed, as a National Policy, to continue after the Civil War.

> "The present situation is a consequence of a National Policy, or rather the lack of a National Education Policy, which has persisted for generations."

This lack of a National Education Policy has now been cured by the adoption of the Elementary and Secondary Education Act of 1965.

Dr. Conant's evaluation of the current problem is far more reasonable than that presented by the finger-pointing approach. The distinction between "de jure" segregation and "de facto" segregation begs the question. It is unworthy of the federal judiciary.

Congress, when it adopted the Green Amendment, which requires that *the guidelines shall be uniformly applied and enforced throughout the fifty states,* placed itself on record for uniform desegregation requirements throughout the nation.

Surely this argument of the Congresswoman from Oregon is unanswerable:

> "On the basis of equity—fairness—and justice in this land, I urge the adoption of this amendment so that it will be clear that we are saying to the Office of Education that the Congress of the United States intends that any rules and regulations or guidelines will be administered the same in Mississippi as they are in Oregon;
>
> "That they will be administered the same in Virginia as they are in New Jersey;
>
> "The same in Maryland as they are in Pennsylvania—and to stop this nonsense of picking out one part of the country and singling out that part of the country for separate treatment."

A School's Faculty Should Not Be Chosen on a Racial Basis

What has been said herein with respect to classification of pupils by race, and the assignment of pupils to schools on a racial basis, applies with equal force to the

teachers in our public schools. They should not be classified by race, and their employment to teach should not be made to depend on their race, color, creed or national origin.

When school boards are saddled with racial quotas for faculties, they necessarily have to condition their employment of teachers on their race or color. If a board has a sufficient number of black teachers to meet its quota requirements for a particular school, and there are vacancies to be filled, it must refuse to employ a qualified black teacher who applies for the position simply because he or she is black. The converse of that statement is also true.

Again we say, race, as religion, ought never to be acknowledged as constituting in any way a valid condition or measure, in this nation, of a person's access to public facilities, positions or activities of any sort. Those who would make it such ought to be rejected, whatever their intentions, with the finality reserved for those who would play God with the human race.

Summary of Argument

The mandate of *Brown* was, and is—

a) To cease the practice of segregating children solely *on the basis of race;*

b) To revise school districts and attendance areas "into compact units";

c) "To achieve a system of determining admissions to the public schools *on a nonracial basis*"; and

d) To create *"a system not based on color distinctions."*

The subsequent decisions of this Court have not changed the directives of *Brown*. *Green, Raney* and *Monroe* had to do with the constitutionality of "freedom-of-choice" plans and dealt with facts entirely dissimilar from

those involved in the plan of a school district restructured in obedience to the commands of *Brown*. The order in *Alexander*, which proscribed a school system *based on race or color*, and which called for a school system within which *no person is to be effectively excluded from any school because of race or color*, is in exact accord with the commands of *Brown*.

The *Civil Rights Act of 1964*, in which "desegregation" is defined to mean the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, and not to mean the assignment of students to public schools in order to overcome racial imbalance, and which prohibits a court from issuing an order seeking to achieve racial balance in any school, and which validates assignments for reasons other than race, color, religion or national origin, is further confirmation of the validity of what this Court said in *Brown*.

Brown, the subsequent school decision of this Court, and the *Civil Rights Act of 1964*, all carry out the proper construction of the Fourteenth Amendment to the Constitution of the United States, which is probably best summarized by this quotation from the dissenting opinion of Mr. Justice Harlan in *Plessy* v. *Ferguson*:

> "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."

Hence a desegregation plan formulated in obedience to the commands of *Brown*, i.e., a desegregation plan which provides for the creation of attendance areas or zones fairly

arrived at, bounded by natural, nonracial monuments which define, in truth and in fact, true neighborhoods, and directs that all children living in such an attendance area or zone, without exception, should attend the appropriate school in his or her attendance area or zone, is constitutional, even though the concentration of children of one race in particular areas or zones results in racial imbalance in the schools and in some all-white and some all-black schools.

For the same reasons that racial classifications of pupils, and assignment of pupils by race, should be prohibited as contrary to the equal protection clause of our federal constitution, classification of teachers by race, and employment of teachers on a racial basis, should be prohibited.

Since this is a nation composed of sovereign states, governed by the same Constitution, school desegregation requirement, which must be rooted in the Constitution, must apply, and be enforced, uniformly throughout the country.

CONCLUSION

The State of Mississippi, amicus curiae, submits that the questions presented in this and companion cases, should be resolved by an opinion and order of this Court to the effect (a) that de facto segregation which occurs fortuitously because of housing patterns does not render an otherwise acceptable desegregation plan unconstitutional, (b) that racial balance is not required in neighborhood schools, (c) that courts are not authorized to require a school district to gerrymander its attendance area or zone lines so as to include pupils of a certain race within an attendance area or zone, who would not be included therein

if its attendance area or zone lines were drawn in a reasonable, rational and nonracial fashion, (d) that a school board should not be required to employ its faculties on a racial basis, and (e) that school desegregation requirements should be made uniform throughout the United States.

Respectfully submitted,

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